

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEB 15 1996

In The Matter of)

Amendment of Part 90 of the)
Commission's Rules Concerning)
Future Development of SMR Systems)
in the 800 MHz Frequency Band)

PR Docket No. 93-144

RM-8117, RM-8030
RM-8029

Implementation of Sections 3(n) and 322)
of the Communications Act)
Regulatory Treatment of Mobile Services)

GM Docket No. 93-252

Implementation of Section 309(j))
of the Communications Act)
Competitive Bidding)
800 MHz SMR)

PP Docket No. 93-253

To: The Commission

COMMENTS
OF
DUKE POWER COMPANY

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Dated: February 15, 1995

TABLE OF CONTENTS

SUMMARY.....	i
BACKGROUND AND PRELIMINARY STATEMENT.....	2
COMMENTS.....	4
A. The Commission Must Further Delineate Its Definition of Comparability To Ensure That Incumbents Will Be Guaranteed Adequate Replacement Facilities And That Their Systems Will Not Be Compromised by Service Interruptions.....	5
B. The Commission Should Modify It's Transition Timetables.....	7
C. Duke Generally Supports The Commission's Negotiation Proposals, But Has Reservations About The "Good Faith" Element.....	8
D. The Commission Must Make Allowances For Continued Operation of Private Systems Which Serve Vital Public Interests.....	10
CONCLUSION.....	12

SUMMARY

Duke generally supports the Commission's 800 MHz spectrum transition plan. Realizing that the Commission is under a Congressional mandate and that some spectrum auctioning for 800 MHz frequencies is inevitable, Duke believes the Commission's attempt to ensure that an orderly transition will take place wherein incumbent licensees will be "made whole" is laudable. Nonetheless, Duke has concerns that the remaining details of the transition plan be established in a manner which will take into account the needs of incumbent private system licensees. Moreover, Duke strongly urges the Commission to establish some plan by which the long term spectrum needs of critical private telecommunications systems may be met.

Duke supports the Commission's requirement that EA licenses provide incumbents with comparable facilities or be forbidden from moving incumbents from current spectrum assignments. Duke believes while the Commission's current definition of "comparable facilities" is workable, the definition must be expanded to insure that all reasonable costs of spectrum migration are compensated by the new EA licensee. Duke also believes that where incumbent system upgrades are a demonstrated component of comparability, those upgrades must be made available to incumbents with compensation by EA licensees.

The Commission should, on its own motion, reconsider the transition time table adopted. Specifically, in order to meet the special transition problems of large scale wide area incumbent systems like Duke's, the Commission should adopt a two year voluntary/one year mandatory

negotiation plan. This modification would ensure adequate flexibility in negotiation arrangements to encourage expeditious and workable agreements between EA licensees and large scale incumbent system licensees. Duke also believes that the “good faith” element of the Commission’s transition plan should be modified.

Finally, Duke believes the Commission must make special allowances for continued operation of private systems which serve vital public interests. Duke believes that the Commission must clarify that private system operators, in addition to SMR operators who accept replacement channels will not face a future second migration. Additionally, the Commission should not allocate the 150 General Access category channels to purely commercial operations since this will leave private system licensees with only Industrial Pool channels for future system expansions. Alternatively, the Commission must establish a separate private systems plan, featuring adequate spectrum resources to meet the future needs of critical private systems. The Commission should take this action within the instant docket proceeding.

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800 MHz SMR)	
To: The Commission		

COMMENTS OF DUKE POWER COMPANY

Duke Power Company ("Duke"), by its attorneys, in accordance with Section 1.415 of the Rules and Regulations of the Federal Communications Commission ("Commission" or "FCC"), hereby respectfully submits the following Comments in response to the Commission's invitation in the above-captioned proceeding.¹ As licensee of a wide area private 800 MHz system, Duke is vitally concerned with the Commission's finalization of its transition plan, since the plan will affect Duke's "lifeline" telecommunications facilities. Accordingly, Duke is pleased to have this

¹ *In the Matter of Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, PR Docket No. 93-144, RM-8117, RM-8030, RM-8029; *Implementation of Sections 3(n) and 322 of the Communications Act - Regulatory Treatment of Mobile Services*, GN Docket No. 93-252; *Implementation of Section 309(j) of the Communications Act Competitive Bidding*; First Report and Order ("*First R&O*"), Eighth Report and Order ("*Eighth R&O*"), and Second Further Notice of Proposed Rulemaking ("*2nd FNPRM*" or "*FNPRM*").

opportunity to present its views to the Commission. Duke believes it is critical that the Commission take steps within this proceeding to ensure that the special needs of private telecommunications systems continue to be met.

I. BACKGROUND AND PRELIMINARY STATEMENT

1. Duke is a major public utility which is certificated by the states of North Carolina and South Carolina to provide electric power throughout the Piedmont and Western sections of the Carolinas. Duke is one of the nation's largest public utility companies and is responsible for providing electric power to approximately 1.8 million customers throughout its 22,000 square mile service area. Duke's power network includes numerous generating stations and substations as well as nuclear power plant facilities. Moreover, Duke has a significant presence throughout its service area as a consumer electronics retailer.

2. Management and operation of Duke's large and geographically diverse service area encompasses numerous functions for which reliable private telecommunications support is required. Among these functions are routine maintenance of the Duke Power system, answering of service calls, service installations and deletions, as well as the handling of emergency situations which may be caused by accidents or natural disasters. At an early date, Duke determined that absolutely reliable, dedicated private telecommunications facilities were an imperative to ensure the safe and efficient delivery of electric power in the Carolinas. For example, when storms or accidents cause the downing of a power line, time is of the essence in getting crews to the site to isolate the line from

the public in order to avoid the possibility of injury or worse, as well as to promptly effect repairs and restore electric service. While such incidents fortunately are comparatively uncommon, absolute reliability in telecommunications dispatch services is essential at such times, and despite the costs involved, Duke became convinced at an early date of its need for a private internal telecommunications system. Accordingly, in the mid-1950's Duke applied for and was awarded licenses to construct a private land mobile radio system which operated on low-band frequencies. This system was expanded in the 1970's to quadruple its capacity. Continued growth in Duke's operations as well as population shifts which dramatically increased its customer base soon rendered this system obsolete.

3. Duke realized its need for an expanded and highly reliable internal telecommunications system which could offer the required dispatch services in addition to an adequate capacity to handle high levels of routine traffic. Duke subsequently applied for and received authorization to construct a wide area 800 MHz private land mobile radio system to provide basic telecommunications services throughout the entire Duke service area. This system has now been successfully constructed and operated for several years. Duke has invested millions of dollars in this quite complex system which encompasses over 41 base and/or mobile relay sites, 4300 mobile radios, 850 portable radios, 255 control stations and three main dispatch console systems. In the aggregate, the Duke System is licensed for operation on 63 channel pairs. The system provides the sole telecommunications capability for practically all of Duke's operating divisions including: field services, engineering, operations, construction, power delivery and customer service personnel. A significant portion of the traffic now routinely carried over the Duke System includes service

restoration, safety, emergency response and field personnel dispatch activity. Certainly, these operations are critical to the public welfare.

4. Duke's concerns over the instant proceeding are significantly heightened because 30 of the 63 channel pairs currently authorized to the Duke system are contained within the "upper 200" Special Mobile Radio ("SMR") channel block which the Commission now has reallocated to commercial services through wide area auctions, with concomitant mandatory migration for private system incumbent licensees. Duke is generally supportive of the Commission's proposed overall spectrum transition framework, as the plan requires that displaced licensee's systems be made whole by the new Economic Area ("EA") commercial licensees. However, Duke reminds the Commission of the critical nature of its internal telecommunications system, and asks that the Commission take steps to ensure that Duke's 800 MHz telecommunications facilities will not suffer outages during the transition period, since such outages could seriously compromise the public safety and welfare.

II. COMMENTS

5. At the outset, Duke wishes to commend the Commission for taking steps in the First R&Q to broadly establish what Duke hopes will be a workable approach, as it appears that 800 MHz spectrum auctions will be difficult to avoid. Duke realizes that the Commission is under a Congressional mandate to auction spectrum for commercial services and acknowledges that where commercial services predominate in a given spectrum segment, some level of spectrum auctioning will be inevitable. Duke believes that the Commission's attempts to ensure that incumbent licensees

are "made whole" during the transition process and that system hand-offs are made as seamless as possible are positive developments. Nonetheless, while the Commission's general policies point toward reasonable treatment of incumbents, Duke is very concerned that the transition program, for which the details remain to be fully developed, will provide adequate safeguards to offer incumbent licensees assurance that the Commission's general policies will be served. Additionally, Duke requests that the Commission take steps to ensure adequate spectrum will remain available for critical services to be provided via private telecommunications systems.

A. The Commission Must Further Delineate Its Definition of Comparability To Ensure That Incumbents Will Be Guaranteed Adequate Replacement Facilities And That Their Systems Will Not Be Compromised by Service Interruptions.

6. Duke is pleased that the Commission will continue to require that EA licensees provide incumbents with "comparable facilities" or will be forbidden from moving incumbents from current spectrum assignments.² While the general principles adopted on this point are laudable, Duke believes that the Commission must expand its definition of "comparable facilities" to ensure that displaced incumbent system operation may continue with adequate operational capabilities. Duke agrees that relocated incumbent licensees must, at a minimum, receive from EA licensees the same number of channels with the same bandwidth capacity on relocation, as employed in their systems prior to migration.

² FNPRM at Paragraph 279.

7. Duke also agrees with the Commission that an important element of "comparability" is an allowance for incumbents to have entire system relocation available at one time, and that EA licensees not be enabled to "cherry pick" frequencies at will over potentially long periods of time from incumbent systems. Duke also agrees that the service contour given through relocation to the incumbent must encompass all the territory covered by the system's original contour.³

8. Duke believes that the Commission's definition of "comparable facilities" must also be expanded to include assurances that any and all retuned frequencies obtained are fully compatible in a multi-channel system at the incumbent's present location. Additionally, the definition of comparability must also provide that all incumbent radio units, including control and base station facilities, will be reprogrammed or recrystallized at the EA licensee's expense. Further, the Commission must require that following spectrum retuning, the incumbent's new system provide identical or superior performance to the existing system including acceptable interference protection throughout the system's footprint as well as adequate separation of channels.

9. Additionally, Duke is concerned that in some instances upgrades will be a necessary component to providing an incumbent with a truly comparable alternative system. For example, where an EA licensee may not be able to provide adequate spectrum to easily make an incumbent licensee's system whole, an upgrade to "all digital" facilities may offer the optimal solution. The Commission's rules should specify that such upgrades will be considered a part of compensable cost

³ FNPRM at Paragraph 283.

recovery, even during the mandatory relocation period. This approach would foster greater flexibility in negotiations and expedite the migration process.

B. The Commission Should Modify It's Transition Timetables.

10. The Commission's timetable for incumbent 800 MHz system relocation gives Duke significant concern. Duke is aware that the Commission adopted its mandatory relocation plan in the First Report and Order.⁴ Accordingly, the rules surrounding the system transition timetable are considered final, absent reconsideration by the Commission or appellate court review. Nonetheless, Duke feels compelled to remind the Commission that negotiation and actual system redesign and relocation in many instances will be quite time consuming, particularly in the case of large scale and critical telecommunications systems like Duke's.

11. Thus, Duke believes it prudent that the Commission, on its own motion, reconsider the transition timetable and adopt a two year purely voluntary negotiation period followed by a one year mandatory relocation period. It appears from the discussion in the FNPRM that the Commission is well aware that a wide ranging array of relocation possibilities and challenges will exist for both incumbents and EA licensees. However, it also seems that the Commission is convinced that incumbent licensees will attempt to stall negotiations and engage in bad faith negotiating tactics. Duke is convinced that in the majority of cases, this should not be a concern at

⁴ First Report and Order, Paragraphs 65-72.

all. Most incumbents realize the inevitability of migration and are interested in making the transition as reasonably expeditious and painless as possible. Accordingly, Duke believes that the suggested timetable modification, contrary to the Commission's apparent belief, will not cause retardation of the transition process, but will in fact expedite and enhance the transition process by leaving details of complicated and large scale system transitions open to the negotiating parties for a period which should prove adequate for the planning and migration of such systems. Alternatively, the Commission could adopt a procedure whereby only systems of a certain minimum size and complexity would be allowed to avail themselves of the longer transition timetable. This step at least would ensure that those systems having the most pressing needs for a longer transition period would be allowed to take advantage of an extended timetable.

C. Duke Generally Supports The Commission's Negotiation Proposals, But Has Reservations about the "Good Faith" Element

12. Duke is pleased to note the Commission's proposals to ease negotiation arrangements between incumbents and EA licensees. The Commission's proposal that relocation costs be distributed among benefiting EA licensees is helpful.⁵ Duke believes that, if adopted, this policy would encourage early full-system buyouts since those system relocation costs assumed by one EA licensee which accrue ultimately to the benefit of another EA licensee, will be compensated. Duke strongly supports the Commission's proposal that incumbents be given the authority to compel

⁵ FNPRM at Paragraph 269.

simultaneous system migration negotiations with all affected EA licensees.⁶ Duke's current system encompasses an area covered by seven different EAs. When a possibility of three separate new licensees per EA is considered, this will put Duke in the untenable position of attempting to negotiate migration of its frequency-interdependent system with twenty-one different parties. Duke is convinced that the only way such a complex migration problem can be solved is for the Commission to mandate simultaneous relocation planning and system reconfiguration with all EA licensees authorized to operate in Duke's current system footprint. Accordingly, Duke strongly supports the Commission's proposal.

13. Duke further supports the Commission's proposal to allow spectrum disaggregation and system partitioning.⁷ For those large system licensees who ultimately choose a strategy of entering spectrum auctions and obtaining EA licenses to protect current frequency complements, the capability to share EA licensee rights with other parties through disaggregation or partitioning will prove beneficial. This policy will encourage the most efficient use of the spectrum resource. Duke believes that the Commission should adopt liberal regulations with regard to such policies and allow the marketplace alone to determine how much spectrum or how large a geographic area could be disaggregated and/or partitioned by the EA licensee.

⁶ Ibid.

⁷ FNPRM at Paragraph 262.

14. Duke has significant concerns about the proposed "good faith" presumptions in the Commission's negotiation plan.⁸ Duke suggests modification of the "good faith" provisions proposed by the Commission to take effect during the mandatory negotiation period. A blanket policy that any offer by an EA licensee to replace an incumbent's system with "comparable" facilities would constitute a good faith offer is an unworkable approach. Every system is unique and the definition of "comparable" facilities cannot, even with the best of intentions, be sufficiently delineated to cover migration of every incumbent system. Adoption of such a policy will therefore place incumbent licensees at a negotiation disadvantage. Under such a plan, honest concerns of incumbent licensees could be turned into a basis for an EA licensee to allege "bad faith" on the part of an incumbent and to seek Commission sanctions. Duke suggests that the Commission adopt an open policy whereby bad faith must be alleged and proven on the basis of clear evidence indicating specific efforts to abuse and/or circumvent the Commission's relocation policies. Additionally, where incumbents continue to make themselves reasonably available for discussions and negotiations with EA licensees, good faith on the part of the incumbent licensee should be presumed absent the specific showing discussed above.

D. The Commission Must Make Allowances For Continued Operation of Private Systems Which Serve Vital Public Interests.

15. As noted above, Duke understands that the Commission is under a mandate from Congress to generate revenues through the auction of spectrum for commercial purposes. However,

⁸ FNPRM at Paragraph 286.

this mandate must not obscure the need for private systems, or the Commission's responsibility to ensure the long term capabilities of such systems to serve vital public needs. Over several years, Duke has invested millions of dollars in its private telecommunications system, and during this time, the system has expanded greatly. This expansion can be attributed in part to Duke's determination to improve service to its existing customers and to enhance safety in delivery of electric power. However, this system expansion may also be attributed to growth in residential and business customer bases in Duke's operational area. With the continuing growth of the Sunbelt economy, it is not improbable to believe that Duke will need to further expand its system in the future.

16. Thus, Duke is very concerned as a general matter with the Commission's further proposals that practically all 800 and 900 MHz spectrum allocated for mobile services be licensed to commercial entities with the exception of the Industrial Pool frequencies. Not only does the "lower 80" auction plan severely limit the availability of additional channels which could be used to enhance or expand private systems such as Duke's, but the loss of the 150 General Category channels will likely preclude any further growth or development of private systems since Industrial Pool channels are in short supply in virtually all markets. While some telecommunications functions performed by Duke could be migrated to commercial systems, certain core functions such as emergency operations, system service, and restoration activity must be accommodated on a private internal system which Duke can be assured will offer the necessary high reliability levels required for such operations.

17. Accordingly, Duke believes that allocation of the General Category channels to commercial operations ultimately would prove unwise, and Duke asks that the Commission establish some arrangement whereby spectrum will be made available for future expansion of private systems by Duke and other similarly situated entities. Based on its future private system concerns, Duke continues to support the Commission's decision that any incumbent licensee moved to the "lower 80" or General Category channels be assured that no "second migration" will be required, even if the Commission should move forward with its proposal to auction those channels for commercial operations at a future date. Duke asks that the Commission clarify that this policy will be extended to cover relocated private system licensees, and also asks that the Commission take additional measures in this proceeding to secure and make available adequate spectrum resources to meet the continuing needs of private system licensees.

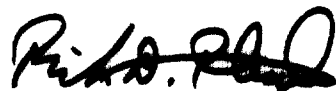
III. CONCLUSION

18. Duke reminds the Commission that the public interest and safety require that private telecommunications systems such as Duke's continue to serve the public without undue hindrance. Duke believes with the relocation of incumbent 800 MHz private system operators, a policy must be established which will ensure that the transition from current spectrum assignments is orderly as well as seamless and that basic public needs are not compromised. Additionally, the Commission must ensure that all of the financial costs which would accompany private system migrations not be assumed by incumbent licensees -- or in the case of Duke, its rate payers. Duke further reminds the Commission that such systems clearly operate in the public interest on a not-for-profit basis and

it is not in the public interest to compromise the operation of such systems simply to raise federal revenue through spectrum auctions.

WHEREFORE, THE PREMISES CONSIDERED, Duke Power Company respectfully requests that the Federal Communications Commission act in this proceeding in a manner fully consistent with the views expressed herein.

Respectfully submitted,
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Dated: February 15, 1996

CERTIFICATE OF SERVICE

I, Vanessa N. Duffy, do hereby certify that I have, this 15th day of February, 1996, caused to be sent by hand delivery copies of the foregoing "Comments of Duke Power Company" to the following:

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